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No. 02-1616

IN THE

Supreme Court of the United States

MICHAEL A. WILKINS,

Petitioner,

v.

DISCIPLINARY COMMISSION OF THE SUPREME COURT OF INDIANA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA

REPLY BRIEF

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REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

The Commission's Brief presents no reason to deny the writ. It begins by misrepresenting the record and ends by misrepresenting that Part I of the opinion on rehearing by two justices with two dissents in *Wilkins IV*, displaced the 3-2 Per Curiam decision of *Wilkins I* (App. 1a-12a & 29a-30a). In between, the Commission attempts to obscure the many splits among the state high courts on the applicability of *New York Times*; *Garrison*; and *Milkovich* to protect lawyer advocacy.[1] In short, the First Amendment issues were raised, *repeatedly*,[2] there are multiple wide splits among the state high courts and a federal circuit making the constitutional issues raised by Petitioner ripe for consideration by this Court, and *Wilkins I* (unaffected by the rehearing opinion Part I, *Wilkins IV*) totally ignored both *New York Times* and *Milkovich*.

I. *Misrepresentations That Questions Were Not Presented Below.*

The Commission's assertions that the First Amendment questions, presented here, were not raised below (an assertion the Commission did not make before the Hearing Officer, on the Petition for Review or on the Petition for Rehearing) are bald misstatements. The two dissenters in *Wilkins I* belie the Commission's assertions (App. 12a-15a). The dissents expressly

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1. *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964); *Garrison v. State of Louisiana*, 379 U.S. 64 (1964); *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990).

2. Due to the Commission's misstatements, the portions of the Trial Brief, Petition For Review and Petition For Rehearing are set forth in the Supplemental Appendix submitted herewith.

adopted Wilkins' First Amendment arguments that footnote 2 was but an opinion incapable of being proven untrue by the charger or that a subjective actual malice standard was required, and was therefore protected speech under the First Amendment.

Contrary to the Commission's mischaracterization of the Record,[3] the *New York Times* subjective/actual malice standard was repeatedly raised:

1. initially in the trial brief before the Commission;[4]

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3. The Commission states:

> Even then [in the trial brief] Wilkins did not assert . . . nor did Wilkins make a First Amendment claim that . . . the standard must be subjective . . . Even in its petition to the Indiana Supreme Court for Review . . . Wilkins restricted his First Amendment argument that footnote 2 was protected speech because it was not provably true or false.

(Brief, p. 8) The same misrepresentation is scattered throughout the Commission's statement of the case: "In discussing the First Amendment arguments, Wilkins did not assert . . . or that the Disciplinary Commission's charge of reckless disregard had to be proved by subjective rather than an objective standard." (Brief, p. 3). And further: "In his Petition for Review and supporting brief, Wilkins, again, did not argue . . . that the reckless disregard standard had to a subjective one." (Brief, p. 3)

4. Petitioner's Trial Brief before the Indiana Commission, the first matter responsive to the Complaint as no answer was required under the Disciplinary Rules, specifically requested that the hearing officer and Indiana Supreme Court revisit its holding in *In Re Terry*, 271 Ind. 499, 394 N.E.2d 94 (1979), in which the Indiana Supreme Court had declined to apply the *New York Times* actual malice test to charges of attorney misconduct, echoing Indiana Justice Sullivan's invitation for such a reconsideration in *In re Atanga*, 636 N.E.2d

(Cont'd)

2. then in the Petition for Review (*de novo*) to the Indiana Supreme Court, which expressly challenged the hearing officer's proposed decision as contrary to the First Amendment's requirement of actual malice;[5] and

3. again in the Petition for Rehearing which challenged the Per Curiam Opinion (*Wilkins I*) for "failing to adopt the First Amendment *New York Times* standard . . . by failing to apply a subjective standard;"

The Commission never at any stage contended that the issue had not been timely or properly raised.

(Cont'd)
1253, 1259 n.1 (Ind. 1994). After citing and discussing both *Terry* and *Atanga*, Petitioner stated in his trial brief: "Mr. Wilkins contends that the charges in this case demonstrate that Indiana should indeed revisit the *Terry* opinion and afford attorneys greater constitutional protections in criticizing judicial opinions, if not the judiciary itself, as set forth below." Supp. App. 2a; and *see* p. 5a, also requesting that the holding in *Terry* be reconsidered; *see also* Supp. App. 4a-8a discussing, *Yagman*; *Green*, and the other pertinent authorities presented in the petition.

5. The Petition for Review *de novo* in paragraph 2 challenged that the findings

> are erroneous . . . for one or more of the following: * * * d. Rule 8.2(a), the First Amendment and the Indiana Constitution require that the lawyer knew that a statement was untrue, or had reckless disregard of its truth or falsity pursuant to a subjective culpability, but Respondent had a good faith belief that footnote 2 was an appropriate critique of the Opinion (*See* Brief . . . pp. 13-14 incorporated herein).

Supp. App. 14a.

The Commission also misstates that the burden of proof of falsity is an unraised question separate[6] from whether footnote 2 is protected speech as rhetorical hyperbole or opinion incapable of being proven untrue by the charger. The burden of proof of falsity is but a part of the First Amendment principle that rhetorical hyperbole or opinion is protected speech precisely *because* the charger cannot carry the burden of proof of *factual* falsity. *See Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 19-20 (1990) ("Hepps ensures that a statement of opinion relating to matters of public concern which does not contain a provably false factual connotation will receive full constitutional protection"); *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 777 (1986). This is precisely the first question presented here which was raised

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6. The Commission begins by stating that "part of Wilkins' argument includes the claim that the . . . Commission had the burden of proving the actual falsity of the factual assertions in the footnote. Pet. at 6." Of course, there is no such argument in the Petition at p. 6 as cited. The burden of proof issue is a part of the issue that footnote 2 being rhetorical hyperbole or opinion is incapable of being proven untrue by the charger. Thereafter, as well as in the statement of the case, the Commission misstates, while Wilkins pursued the argument "that footnote 2 was protected speech because it was not provably true or false but Wilkins did not assert that the First Amendment demanded that the Disciplinary Commission bear the burden of proving falsity. . . ." (Brief, p. 8) And again, that Wilkins failed "to raise this First Amendment burden of proof claim at all in the state court. . . ." (Brief, p. 9). In the statement of the case, the Commission states: "Wilkins did not assert that the burden of proving falsity of the statements . . . fell on the Disciplinary Commission. Instead, his First Amendment claim focused on the contention that footnote 2 was protected speech because it was a statement of pure opinion. . . ." (Brief, p. 3); "In his petition for review and supporting brief, Wilkins, again did not argue that the First Amendment requires the Disciplinary Commission to shoulder the burden of proving the falsity of the statement as footnote 2." (Brief, p. 3).

initially in the trial brief,[7] then in the Petition for Review[8] and again in the Petition for Rehearing.[9]

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7. Citing *Yagman* and *Green*, the trial brief specifically argued

> that statements impugning the integrity of the judge may not be punished unless they are capable of being proved true or false; statements of opinion are protected by the First Amendment. . . . The [*Yagman*] Court concluded 'thus, statements of rhetorical hyperbole aren't sanctionable, nor are statements that use language in a loose figurative sense'.

(Supp. App. 7a).

8. The hearing officer's proposed findings were challenged as contrary to "Rule 8.2(a), the *New York Times* First Amendment standard . . . require that there be an untrue statement of fact that is capable of being proved true or untrue, which footnote 2 is not, but rather is an opinion. (*See* Brief in Support of Petition, pp. 10-12 incorporated herein)" where the petitioner further advanced this issue discussing *Milkovich*; *In re Green*; *Idaho Bar v. Topp*; and *Yagman*. (Supp. App. 14a).

9. The Petition for Rehearing stated:

> The Per Curiam Opinion erred in failing to adopt the First Amendment *New York Times* standard and . . . it contravened the First Amendment *New York Times* standard by placing the burden of proof on respondent and . . . failed to give a First Amendment protection to an opinion which was incapable of being proven true or untrue. . . .

(Supp. App. 18a-20a).

II. *Assertion Of No Splits – Based On Misstatements And Semantic Sleights.*

The Commission's assertion that there is no split in authority among the lower courts – is again grounded in misstatements calculated to obfuscate or cover up the obvious multiple splits. The Indiana Supreme Court did not, as the Commission misstates, simply "decline . . . to entirely extend *New York Times* and its progeny." (Brief, p. 10) Rather, it ignored and rejected in total the *New York Times/Milkovich* standards, as have several other state high courts. (*See* Pet., pp. 12-13).

The Commission contends that state high courts "universally share the view that . . . [the lawyer's] standard *should not be identical* to the standard for ordinary citizen's speech" (Brief, p. 10). This is false [Pet. 11-16] and such a gross generality does not support the Commission's attempted conclusion that there is no split. Even among the state high courts' standards not identical to *New York Times*, there are splits on whether the *New York Times* standard should be rejected entirely, or only as to subjective malice, or how much less than identical the standards should be in the attorney disciplinary context. The Commission's gross generality and the asserted conclusion of no splits demonstrate the Commission's effort to hide the multiple splits, including:

1. those high courts which either ignore or expressly reject the *New York Times/Milkovich* standard in attorney discipline cases including Indiana, Iowa, Kansas, Kentucky, New York, Florida and Delaware[10] (*see* Pet., pp. 13-14);

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10. *In re Wilkins I* and *In re Terry*, 394 N.E.2d 94, 95-96 (Ind. 1979); *In re Frerichs*, 228 N.E.2d 764, 766, 767 (Iowa 1976); *State v. Nelson*, 504 P.2d 211, 214-15 (Kan. 1972) and *In re Johnson*, 729 P.2d 1175, 1181 (Kan. 1986); *Kentucky Bar Assoc. v. Heleringer*, (Cont'd)

2. those state and federal courts which accept *New York Times* in part but reject the subjective actual malice standard for an objective standard;[11]

3. those state and federal courts which while rejecting the subjective malice standard accept *Milkovich*;[12]

4. those state high courts which accept subjective actual malice and *Milkovich*;[13] and

5. whether the burden of proving falsity is on the charger as the Ninth Circuit has held[14] or on the speaker to prove truth as *Wilkins I* and the Florida Supreme Court have held.[15]

Next, the Commission seeks to differentiate "in-court" from "out-of-court" lawyer speech cases – seeming to imply that this

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(Cont'd)

602 S.W.2d 165 (1980), *cert. den. sub. nom., Heleringer v. Bar Association*, 449 U.S. 1101 (1981); *In re Holtzman*, 577 N.E.2d 30, 32 (N.Y. 1991), *cert. den., sub. nom., Holtzman v. Grievance Committee for the Tenth Judicial Dist.*, 502 U.S. 1009 (1999); *Florida Bar v. Ray*, 797 So. 2d 556, 558 (Fla. 2001); *In re Shearin*, 765 A.2d 930, 938 (Del. 2000).

11. *Idaho State Bar v. Topp*, 925 P.2d 1113, 1116 (Idaho 1996); *In re Westfall*, 808 S.W.2d 829, 837-38 (Mo. 1991); *In re Graham*, 453 N.E.2d 313, 322-23 (Minn. 1990); *United States District Court v. Sandlin*, 12 F.3d 861, 867 (9th Cir. 1993); *Standing Committee on Discipline v. Yagman*, 55 F.3d 1430, 1437 (9th Cir. 1995).

12. *State Bar of Texas v. Semaan*, 508 S.W.2d 429, 432-33 (Tex. 1974); *Yagman*, 55 F.3d at 1437-38; *Topp*, 925 P.2d at 1115-16.

13. *In re Green*, 11 P.3d 1078, 1085 (Colo. 2000); *Oklahoma Bar Association v. Porter*, 766 P.2d 958, 968-69 (Okla. 1988).

14. *Yagman*, 55 F.3d at 1441-42.

15. *Ray*, 797 So. 2d at 1558-59.

accounts for the splits (Brief, pp. 11-12). While the Commission's factual observation is superficially accurate (with the caveat that some of the cases included both out-of and in-court statements), none of the "in-court" cases nor "out-of-court" cases seek to justify either the wholesale or partial rejection or adoption of the *New York Times/Milkovich* based on such distinction.[16] Most certainly the Indiana Supreme Court attempted no such justification for ignoring fully all or any part of *New York Times/Milkovich* standards. Indeed, many out-of-court cases and in-court cases rely on (or reject) each other — but not based on the distinction asserted by the Commission. Moreover, the cases which contain both types of statements make no distinction at all. *See, e.g., In re Palmisano*, 70 F.3d 483, 485-86 (7th Cir. 1995). Finally, the in-court and out-of-court cases are intermixed among the four categories of split.[17] So separating the in-court from the out-of-court doesn't avoid the splits.

Having sought to dismiss the lawyer "out-of-court" statement cases, the Commission then seeks to establish no split

16. *Semaan*, for example, involved an attorney's letters to the editor of a newspaper which referred to a judge as a "midget among giants". The Court held the statement to be a protected expression of opinion, incapable of being proved true or false and thus subject to protection under *New York Times*. *Douglas* involved a lawyer's comments published in a newspaper to the effect that a judicial decision resulted from "political expediency" and "power jockeying". Once again, the State Supreme Court held such speech to be protected in the absence of "a serious and imminent threat to fairness and integrity of the judicial system. . . ." Once again, the result did not turn upon the out-of-court rather than in-court character of the statements.

17. *Wilkins I* and *Frerichs* are in-court while Kentucky, Kansas and New York are out-of-court; *Topp* and *Yagman* are in-court while *Green* is out-of-court.

within the "in-court" cases (Brief, pp. 11-12) again using the semantic sleight that they "uniformly apply a different standard" than *New York Times* to contend that no split exists. While inaccurate as to "uniformly", the conclusion of "no split" does not follow – even if all applied a "different" standard from *New York Times* – they split on how much different the standard should be, even as to total rejection as described above.

III. *The Rehearing 2-2 Split On The Merits Is Not The Indiana Court's Opinion.*

It is beyond dispute that the majority in *Wilkins I* (App. 1a-12a) wholly ignored *New York Times/Milkovich* and ignored that footnote 2 was but an opinion or rhetorical hyperbole critiquing an appellate decision as being result-based and in disregard of law and fact. This is undisputable on the face of the Per Curiam Opinion and indeed if there is anything implicit, it is that the Per Curiam thought footnote 2 was a matter of opinion and style.[18]

Wanting to contend that the Court "implicitly disagreed . . . that footnote 2 should enjoy the First Amendment protection afforded by *Milkovich*" (Brief, p. 16), and finding nothing on the face of the Per Curiam, the Commission turns to "Part I" of a two judge opinion on rehearing with two dissenters, *Wilkins IV*, App. 29a-30a, to support that the "Indiana Supreme Court" had "implicitly disagreed" with *Milkovich*. The Commission

18. The majority implicitly indicated this stating: "We find that respondent's statements quoted above, although heavy-handed, roughly paraphrased the bases of transfer set forth in former Appellate Rule . . . the respondent's comments in footnote 2, however, are not even colorably appropriate." (App., 7a). The majority then found "that respondent offered no evidence to support his contentions that, for example, the Court of Appeals was determined to find for appellee, no matter what. Without evidence, such statements should not be made anywhere. With evidence, they should be made to the Judicial Qualifications Commission." (App., 9a).

well knows that Part I of *Wilkins IV* by two judges with two dissenters is not the opinion of the "Court" on the First Amendment issues. In fact, the disqualifying justice made this certain by disqualifying before granting rehearing (rather than after, so as to cure the prior due process issue) – thereby locking in his vote as the third judge in the Per Curiam decision because the remaining four judges would split, as indeed they did, 2-2 thereby denying rehearing on the First Amendment issues (App. 16a-27a, decision on recusal, *Wilkins III* and App. 28a-32a denying rehearing on the merits in *Wilkins IV*.)

IV. *Conclusion*

The Indiana Supreme Court Per Curiam decision totally ignored the First Amendment issues presented and convicted Petitioner, for the second time, of violating Rule 8.2(a) by challenging an appellate decision as being result-based, ignoring law and fact. The Indiana court did so over two dissents that such speech was protected by the First Amendment as rhetorical hyperbole or opinion incapable of being proven untrue by the charger or because subjective malice is required.

Indiana has joined a growing body of state high courts which elevate the importance of the judiciary over other branches by eliminating or restricting First Amendment protection for attorney advocacy critical of the judiciary under the banner of promoting confidence in the judiciary – but achieving the opposite. There are deep splits among the state high courts' application of First Amendment standards in this context. It is time for this Court to define the limits of the state high courts' powers regarding attorney speech in the course of advocacy under the First Amendment.

Respectfully submitted,

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APPENDIX

APPENDIX A — EXCERPTS FROM RESPONDENT MICHAEL WILKINS' TRIAL BRIEF

THE SUPREME COURT
OF THE
STATE OF INDIANA

CAUSE NO. 49S00-0005-DI-341

IN THE MATTER OF:

MICHAEL A. WILKINS
Attorney No. 14368-02

RESPONDENT MICHAEL WILKINS' TRIAL BRIEF

Respondent, Michael A. Wilkins ("Mr. Wilkins"), by counsel, respectfully tenders his Trial Brief for the hearing in the above-captioned matter.

* * *

B. ***Standard of Review***

* * *

In the case of *In Re Terry*, 394 N.E.2d 94 (Ind. 1979) *cert. den'd sub nom. Terry v. Indiana Supreme Court Disciplinary Comm'n*, 444 U.S. 1077, 100 S.Ct. 1025, 62 L.Ed.2d 759 (1980), the Court concluded that it would not require actual malice in analyzing charges of misconduct. In *Terry*, respondent, who had previously been suspended without pay as judge of the Ripley Circuit Court, was charged with making false accusations of a judicial conspiracy to cover up alleged criminal activity. However, in the more recent opinion of *In Re Atanga*, 636 N.E.2d 1253 (Ind. 1994),

Justices Shepard and Sullivan dissented because of the severity of the sanctions imposed, with Justice Sullivan observing that the holding in *Terry* "may be ripe for re-examination in light of the exalted constitutional status given 'political speech' in Indiana by *Price v. State* (1993) Ind., 622 N.E.2d 954, ..." Mr. Wilkins contends that the charges in this case demonstrate that Indiana should indeed revisit the *Terry* opinion and afford attorneys greater constitutional protections in criticizing judicial opinions, if not the judiciary itself, as set forth below.

* * *

D. *The Language Involved Is Protected Speech Under Article I, §9 Of The Indiana Constitution And The First Amendment To The United States Constitution*

Article I, §9 of the Indiana Constitution provides:

> No law shall be passed restraining the free interchange of thought and opinion, or restricting the right to speak, write, or print, freely, on any subject whatever; but for the abuse of that right, every person shall be responsible.

In considering this constitutional protection, the Indiana Supreme Court has written:

> In protecting the freedom of speech and the press, the Indiana Constitution does not merely reiterate the language of the First Amendment. Rather, it

> both emphasizes the broad scope of the freedom and requires the responsibility for its abuse.

Journal Gazette Co., Inc. v. Bandido's, Inc., 712 N.E.2d 446, 486 (Ind. 1999).

The Supreme Court has also stated:

> At a minimum, the clause (Article I, §9) is implicated when the State imposes a direct and significant burden on a person's opportunity to speak his or her mind, in whatever manner the speaker deems most appropriate.

Whittington v. State, 669 N.E.2d 1363, 1368 (Ind. 1996).

Mr. Wilkins does not contend that Rule 8.2(a) is *per se* violative of the Indiana Constitution, but does contend that, as the Disciplinary Commission proposes to apply it in this case, it is unconstitutional in its application.

In *Price v. State*, 622 N.E.2d 954 (Ind. 1993), the Indiana Supreme Court offered an insightful assessment of the scope of Article I, §9 and overturned the appellant's conviction for disorderly conduct. The Court rejected an invitation to find the disorderly conduct statute overbroad or vague, in violation of the First and Fourteenth Amendments, and refused to apply the federal overbreadth analysis as to §9, but did find that the Appellant's rights to free speech trumped the disorderly conduct statute as applied under those circumstances. Mr. Wilkins asserts that the result should be the same in this instance.

Appendix A

In the case of *In Re Friedland*, 416 N.E.2d 433 (Ind. 1981), the Indiana Supreme Court addressed obviously outrageous conduct on the part of an attorney respondent in a disciplinary action who had been accused of attempting to influence public officials by threatening and publishing critical comments about the Disciplinary Commission. The Respondent argued that he was exercising constitutionally protected free speech and the ICLU filed an amicus brief arguing that:

> An individual does not relinquish its rights to petition the government to seek redress through the courts, or to oppose the practices of governmental agencies when admitted to the Bar of this State.

416 N.E.2d at 437.

The Supreme Court responded:

> This Court agrees with these propositions; however, we also recognize that such statements are not absolute in nature, but merely expressions of concern which must be measured in the context of competing social values.

Id.

The Court went on to state:

> This Court in the past has not addressed, specifically, the constitutional tension between the First Amendment and the Code of Professional Responsibility. Upon reflection of this question,

> it is our belief that a generalized test cannot be drawn. Each prohibition, circumscribed by the factual setting present in a particular case, must be examined in light of the affected State interest and measured against the limitation placed on the freedom of expression.

Id.

In this case, the factual setting, examined in light of the affected State interest (the integrity of the judiciary) and measured against the limitation placed on the freedom of expression in the context of advocacy, should lead to the conclusion that the language of Mr. Wilkins' Brief is not sanctionable *per se*, as a matter of law. We acknowledge that the Indiana Supreme Court has rejected a *New York Times Co.* standard (*New York Times Co. v. Sullivan*, 376 U.S. 254, 11 Ed.2dd 686, 84 S.Ct. 710 (1964) in *Terry*, *supra*, but clearly should, as Justice Sullivan has suggested, review the effect on advocates of too rigorous an application of Rule 8.2(a) to attorney speech, to which we would respectfully add *especially* where the speech is in the context of advocacy, as opposed to speech in an extra judicial context.

It is perhaps instructive to consider the Minnesota case of *In Re Graham*, 453 N.W.2d 313 (Minn. 1990), which contains a lengthy discussion of the balance between constitutional First Amendment rights and the interests of the Bar in enforcing Rule 8.2(a). The Minnesota Supreme Court cites *Terry* with approval, rejecting a purely subjective standard. Ultimately, the Minnesota Court held: "The standard must be an objective one, dependent upon what the reasonable attorney,

considered in light of all his professional functions, would do in the same or similar circumstances." *Id.* at 837.

The Missouri Supreme Court in the case of *In Re Westfall*, 808 S.W.2d 829 (Mo. 1991), contains a survey of the law as of 1991 regarding free speech in attorney disciplinary cases. The majority cites *Terry* and *Graham*, *supra*, with approval, and reprimands the respondent, but the dissenting opinion by Chief Justice Blackmar is an excellent discussion of the law and argues for dismissal, ironically implying that the majority opinion is intellectually dishonest. Chief Justice Blackmar states at one point: "[P]ortions of the interview simply charge that the opinion is result-oriented. This assertion is frequently made about judicial opinions, and cannot be found to be a statement of fact." *Id.* at 842. Justice Blackmar cites a trilogy of 1940's vintage U.S. Supreme Court cases as to which he observed:

> The Court explained that the right of freedom of speech includes the right to criticize courts. The trilogy suggests that judges must have thick skins and do not require protection from criticism unless there is malicious defamation. First Amendment interests far outweigh a purpose of 'maintaining respect for the courts'.

Id. at 845.

The most frequently cited case containing a current analysis of the tension between the First Amendment and attorney disciplinary rules is *Standing Committee v. Yagman*, *55* F.3d

1430 (9th Cir. 1995).[14] Applying a "reasonable attorney" standard, rather than a *New York Times* subjective malice standard, the 9th Circuit found that Yagman's statements criticizing a judge did not violate prohibitions against attorneys impugning integrity of the court, nor the prohibitions against interfering with administration of justice, and reversed sanctions imposed by the U.S. District Court for the Central District of California. Yagman had urged application in the *New York Times* subjective malice standard, which the Circuit Court rejected, but it observed that statements impugning the integrity of the judge may not be punished unless they are capable of being proved true or false; statements of opinion are protected by the First Amendment, unless they "imply a false assertion of fact" and "even statements that at first blush appear to be factual are protected by the First Amendment if they cannot reasonably be interpreted as stating actual facts about their target." *Id.* at 1439. The Court concluded "thus, statements of 'rhetorical hyperbole' aren't sanctionable, nor are statements that use language in a 'loose figurative sense'." *Id.*

The *Yagman* case includes a thorough discussion of "intellectually dishonest" rulings, finding respondent's

14. Yagman is described as an "outspoken civil rights lawyer" and was represented in the case by Ramsey Clark. Yagman was quoted as saying that a Central District of California Judge "has a penchant for sanctioning Jewish lawyers. . . . I find this to be evidence of anti-Semitism," and allegedly told a reporter that the same Judge was "drunk on the bench," although that accusation had not been published. In response to a publishers request for comments in connection with the same Judge, to quote the *Yagman* Opinion, "Yagman's response was less than complimentary." *Id.* at 1434. Mr. Yagman's opinion of the Judge is quoted in footnote 4 of the *Yagman* Opinion, and is indeed "less than complimentary."

"allegation of 'dishonesty' does not imply facts capable of objective verification [so that] it is constitutionally immune from sanctions." The opinion concludes with a quote from Justice Black in *Bridges v. California*, 314 U.S. 252 at 270-71, 86 L.Ed. 192, 62 S.Ct. 1990 at 197-98 (1941) (fn. omitted):

> The assumption that respect for the judiciary can be won by shielding judges from published criticism wrongly appraises the character of American public opinion. For it is a prized American privilege to speak one's mind, although not always with perfect good taste, and all public institutions. And an enforced silence, however limited, solely in the name of preserving the dignity of the bench, would probably engender resentment, suspicion and contempt much more than it would enhance respect.

Yagman at 1445.

Most recently, the Colorado Supreme Court in *In Re Green*, 2000 Colo. Lexis 1034 (Colo. 2000), rejected a recommendation for suspension and determined public censure was a proper sanction for misconduct for charging an unreasonable fee. Importantly, however, it dismissed charges that respondent had violated Rule 8.4, adopting the *New York Times* test of actual malice in the context of disciplining attorneys for criticism of the judiciary. The attorney had written a letter to the judge stating: "Circumstances characterize you as a racist and bigot for racially stereotyping me as unable to be an attorney because I was black." The court found the respondent's speech

protected by the First Amendment, cites *Yagman*, *supra*, and dismissed the Rule 8.4 charge.[15]

However unpersuasive the language at issue may have been, Mr. Wilkins' advocacy is entitled to the fundamental free speech protections of Article I, §9 of the Indiana Constitution and of the First Amendment to the United States Constitution. In this context — advocacy — the criticism of the Appellate Opinion should not be misinterpreted as if it was an attack on the integrity of the Court itself. To do so would violate Mr. Wilkins' constitutional rights and would have a chilling effect on advocacy in the State of Indiana.

IV. *CONCLUSION*

Mr. Wilkins contends that the language of which the Disciplinary Commission complains cannot be shown by clear and convincing evidence to have been either intentionally or recklessly false or an attack on the integrity of the Court of Appeals. The language only questioned the analysis which led the Court of Appeals to ignore certain facts and case law contrary to its conclusion. Mr. Wilkins' arguments were *bona fide* arguments predicated upon good faith advocacy, and were protected speech under Article I, §9 of the Indiana Constitution and the First Amendment to the United States Constitution. Mr. Wilkins does not contend that Rule 8.2(a) is *per se* violative of the Indiana Constitution, but with regard to the specific Disciplinary Commission charges against Mr. Wilkins in this case, is unconstitutional

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15. "The court found a "somewhat reduced governmental interest at stake in this context [a letter to the judge] than in the case of public comments to the press."

in its application. The better rule would cloak Mr. Wilkins' language with constitutional privilege as advocacy. Even if the hearing officer and the Supreme Court were not to adopt an advocacy privilege, the language at issue is so innocuous as to make any sanction completely unwarranted.

Respectfully submitted,

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APPENDIX B — RESPONDENT'S PETITION FOR REVIEW OF HEARING OFFICER'S FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION

IN THE
SUPREME COURT OF INDIANA

CASE NO. 49S00-0005-DI-341

IN THE MATTER OF:
MICHAEL A. WILKINS,
ATTORNEY NUMBER 14368-02

Respondent.

RESPONDENT'S PETITION FOR REVIEW OF HEARING OFFICER'S FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION

Respondent, Michael A. Wilkins, by counsel, pursuant to Rule 23, Section 15, Indiana Rules for Admission to the Bar and the Discipline of Attorneys, respectfully petitions the Indiana Supreme Court for Review of the Findings of Fact, Conclusions of Law, and Recommendation (the "Findings") submitted by the Hearing Officer on April 30, 2002, and as grounds therefore states that:

1. The Findings and the charges by the Commission concern whether the Respondent violated Rule 8.2(a) of the Indiana Rules of Professional Conduct [hereinafter "Rule 8.2(a)"] by making a statement that he knew to be false, or with reckless disregard of its truth or falsity, concerning the

integrity or qualifications of a judge, more specifically the judges of the Court of Appeals, by stating in footnote 2 in the Brief in Support of the Petition to Transfer[1] as a part of the allegation that the Opinion had erroneously and materially misstated the Record and had not discussed the relevant cases that:

> Indeed, the Opinion is so factually and legally inaccurate that one is left to wonder whether the Court of Appeals was determined to find for Appellee Sports, Inc., and then said whatever was necessary to reach that conclusion (regardless of whether the facts or the law supported its decision). (Brief in Support . . . , n.2) Complaint ¶ 6).

2. The Findings are erroneous and not supported under the clear and convincing evidence standard in finding that

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1. The Complaint contained three allegations that matter in the Petition to Transfer and Brief were in violation of Rule 8.2(a). The third charge was footnote 2 and the first and second charges, see Brief in Support of Petition for Review, p. 2, concern the allegations in the Petition to Transfer and Brief that the Opinion contained material misstatements of fact pursuant to the language of the former Appellate Rule 11(B)(f) which provided as a ground for transfer that "the Opinion . . . erroneously and materially misstates the Record. . . ." The Findings state at p. 11: "Respondent correctly asserts that two of the three statements made by Respondent in his 'Brief in Support of Appellant's Petition to Transfer' basically paraphrased the provisions of Indiana Appellate Rule 11(B). *See supra* Findings of Fact #6, #7; Joint Stipulation of Exhibits 2 and 3; Rules 11(B)(2)(c) and (f) of the Indiana Rules of Appellate Procedure) and such Hearing Officer finds that the Statements should not be used as bases for disciplinary action."

footnote 2 alleged "unethical conduct", impugned the integrity of the Court of Appeals, that footnote 2 "suggests unethical motivations" or in otherwise determining[2] that Respondent violated Rule 8.2(a), for one or more of the following:

a. Footnote 2 alluding to whether ("one is left to wonder whether") the Opinion was result-oriented or result-based — is a critique of the Opinion in a format used many times by the bench, bar and journals and was not meant, nor is it understood in the legal community, to charge the Court with unethical conduct or to attack the integrity of the Court. (*See* Brief in Support of Petition for Review, pp. 5-9, incorporated herein.)

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2. The Hearing Officer determined that by a footnote 2, the Respondent "suggested that the judges of the Court of Appeals may have been motivated in their decision-making by something other than the proper administration of justice. . . ." [p. 13]; that the comment in footnote 2 was "unfounded and irresponsible" [p. 13]; that "Respondent, by tendering the language of footnote 2 . . . [made] a statement with reckless disregard as to its truth or falsity concerning the integrity of the judges of the Indiana Court of Appeals." [p. 13]; that footnote 2 "suggested that the Court of Appeals was motivated in its decision by considerations other than the administration of justice. Indeed, the footnote suggests unethical motivations." [p. 14]; "Respondent Wilkins alleged deliberately unethical conduct on the part of the Court of Appeals." [p. 15]; and that Respondent Wilkins by footnote 2 "violated Prof. Cond. R. 8.2(a) by making the statement with reckless disregard as to its truth or falsity concerning the integrity of the judges of the Court of Appeals." [p. 16].

b. The meaning of footnote 2 must be determined within the context of trade usage concerning specialized writing — here, the bench, bar and legal writers, and the intent of Respondent, a participant in such community.

c. Rule 8.2(a), the *New York Times* First Amendment standard as incorporated into Rule 8.2(a), and Art. I, Section 9 of the Indiana Constitution require that there be an untrue statement of fact that is capable of being proved true or untrue, which footnote 2 does not, but rather is an opinion. (*See* Brief in Support of Petition, pp. 10-12 incorporated herein.)

d. Rule 8.2(a), the First Amendment and the Indiana Constitution require that the lawyer knew that a statement was untrue, or had reckless disregard of its truth or falsity, pursuant to a subjective culpability, but Respondent had a good faith belief that footnote 2 was an appropriate critique of the Opinion. (*See* Brief in Support of Petition, pp. 13-14, incorporated herein.)

3. The Findings, at p. 14, which find "no constitutional violation in this case," are erroneous and contrary to law in that Rule 8.2(a), as applied to footnote 2 is unconstitutional, as applied to Mr. Wilkins' statements which were made in the context of advocacy for a client. Mr. Wilkins' advocacy constitutes protected speech under both Article I, Section 9, of the Indiana Constitution, and under the First Amendment to the United States Constitution.

4. The Findings are erroneous as a matter of law because the Indiana Supreme Court Disciplinary Commission failed to prove by clear and convincing evidence that Mr. Wilkins violated Rule 8.2(a).

5. The Findings are erroneous as a matter of law because the Hearing Officer failed to consider or erroneously excluded critical, uncontroverted evidence, while erroneously requiring that the Respondent prove "willful disregard of the facts or law by the Court of Appeals" (Findings at p. 15) in order to substantiate Respondent's reasonable argument and good faith belief that the Court of Appeals actually did "ignore" facts and law, all contrary to the Commission's burden of proof by clear and convincing evidence. Specifically, the Hearing Officer finds: "In other words, Respondent provides no evidence that the Court of Appeals ignored anything," (which is the Commission's burden) when in both his Trial Brief (Record, Tab 15, p. 14) and at the disciplinary hearing (Transcript, p. 47, l. 7 through p. 53, l. 15), Mr. Wilkins and counsel demonstrated his good faith belief as to such.

6. The Findings are erroneous as a matter of law and contrary to the evidence in that the Hearing Officer's Findings do not support the Conclusions of Law, particularly in that the Hearing Officer rejected paragraph No. 12 of the parties' Joint Stipulation that Mr. Wilkins is "genuinely and sincerely remorseful," a factor in mitigation, and erroneously re-characterized Mr. Wilkins' good faith defense of his advocacy and intentions as "Facts in Aggravation." Otherwise stated, paragraph 22 of the "Facts in Aggravation" portion of the Findings is contrary to the evidence (and paragraph 12 of the Joint Stipulation of Facts) and erroneous as a matter of

law in that the Hearing Officer erroneously misconstrued Respondent's reasonable "belief" in the substance of the argument advanced in the Brief in Support of Petition to Transfer as evidencing a lack of remorse, even though such positions are not inconsistent.

7. In the alternative, the Hearing Officer's "Recommendation" that the Respondent receive both a public reprimand *and* a thirty (30) day suspension from the practice of law is erroneous as a matter of law and contrary to the evidence. Such penalties would be greatly excessive in light of Mr. Wilkins' exemplary record as a lawyer, his lack of intent to attack the integrity of the Court of Appeals, the facts surrounding the alleged misconduct, his remorse, and other factors, especially when compared to prior cases involving violations of Rule 8.2(a) in which attorneys directly attacked the integrity and fitness of judges, in some cases implying criminal behavior. Assuming Mr. Wilkins has committed misconduct by including footnote 2 in the brief in support of Petition for Transfer, such behavior warrants, at most, a private reprimand.

WHEREFORE, the Respondent, Michael A. Wilkins, by counsel, respectfully: (1) petitions the Indiana Supreme Court for a review of the Findings of Fact, Conclusions of Law, and Recommendation submitted by the Hearing Officer on April 30, 2002; (2) requests a determination that Mr. Wilkins engaged in no misconduct; or, alternatively, requests a determination that any misconduct warrants either a private reprimand or no sanction at all; and (3) requests all other relief proper in the premises.

Appendix B

Respectfully submitted,

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APPENDIX C — EXCERPTS FROM MICHAEL A. WILKINS' PETITION FOR REHEARING IN THE SUPREME COURT OF INDIANA

Respondent petitions this Court (i) to rehear this case, (ii) after granting rehearing, to withdraw the Per Curiam Opinion; after (i) and (ii), Petitioner moves that (iii) Justice Rucker recuse himself, and (iv) the Court then find for Respondent.

This Court, in a 3-2 decision, determined that Respondent violated Rule 8.2(a) when in a footnote in a brief on transfer, he criticized the Court of Appeals' decision as being result-based ignoring law and fact. The Per Curiam Opinion is erroneous as hereinafter set forth.

ISSUES:

1. The Per Curiam Opinion erred in failing to adopt the First Amendment *New York Times* standard,[1] and

   (a) contravened the First Amendment *New York Times* standard by placing the burden of proof on Respondent, and

   (b) contravened the First Amendment *New York Times* standard by failing to apply a subjective standard, and

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1. The First Amendment restrictions apply to the States through the Fourteenth Amendment. *See Gitlow v. New York*, 268 U.S. 652, 666 (1925); *Schneider v. State*, 308 U.S. 147, 160 (1939); *Bridges v. California*, 314 U.S. 252, 268 (1939); *Edwards v. South Carolina*, 372 U.S. 229, 235 (1963); *New York Times Company v. Sullivan*, 376 U.S. 254, 276 (1964), and *Garrison v. Louisiana*, 379 U.S. 64 (1964).

(c) failed to give First Amendment protection to an opinion which was incapable of being proven true or untrue;

(d) contravened the First Amendment by determining that an attorney may only contest judicial conduct before the Judicial Qualifications Commission and not in proceedings where such conduct occurs.

2. Justice Rucker, being the object of a critique found to impugn his integrity and being a witness to the alleged result-based decision ignoring fact and law as a participant in the deliberations before and/or after the oral argument, was under a duty to disqualify himself, and having failed to do so and having participated in the Per Curiam decision, deprived Respondent of due process of law under the Fourteenth Amendment.

3. The Court denied Respondent his due process rights when it ordered an enhanced sanction because Respondent contested this matter through the procedures available under the Admission and Discipline Rules.

Appendix C

ARGUMENT:

1. *First Amendment Errors.*

The Per Curiam Opinion makes it clear that the *New York Times* standard is not accepted. Rather, the Per Curiam opinion, while recognizing "the constitutional tension between the First Amendment and the Code of Professional Responsibility," rejects that any test can be drawn and adopts a case-by-case analysis that "each prohibition, circumscribed by the factual setting present in a particular case, must be examined in light of the affected State's interest and measured against the limitation placed on the freedom of expression." (Opinion p. 7 (adopting *In re Matter of Friedland*, 416 N.E.2d 433 (Ind. 1981))).[2]

Based on this elusive, unparticularized standard, contrary to U.S. Supreme Court precedent, the Per Curiam Opinion summarily finds that "preserving the public's confidence in the judicial system far outweighs any need for the respondent to air his unsubstantiated concerns in an improper forum for such statements." (Opinion p. 7). In doing so, the Per Curiam Opinion found that "the respondent offered no evidence to support his [Fn. 2] contentions" – and even "with such

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2. The Per Curiam Opinion failed to note, as Respondent urged, that Rule 8.2(a), which was adopted by this Court in 1987 after *Friedland*, *supra*, has been held to incorporate the *New York Times* standard. *See In re Green*, 11 P.3d 1078, 1084 (Colo. 2000) ("Indeed, Colo. RPC 8.2(a) incorporates the *New York Times* standard. . . ."); *In re Graham*, 453 N.W.2d 313, 321 (Minn. 1990) ("The language of Rule 8.2(a) . . . impliedly incorporates the [*New York Times*] standard").

evidence, such statements *should be made only* to the Judicial Qualification Commission." (Opinion p. 7 (emphasis added)).

It is respectfully submitted that this determination pays little heed to First Amendment requirements and, in fact, directly conflicts with the First Amendment *New York Times* standard which was set forth in Respondent's Brief, pp. 10-14. Respondent urged the Court to take note of Justice Sullivan's dissent over eight years ago in *In re Atanga*, 636 N.E.2d 1253, 1259 (Ind. 1994), that Rule 8.2(a)[3] adopts the *New York Times* standard.[4] Respondent further urged that this Court should follow the other courts, including the Supreme Courts of Colorado, Minnesota, Delaware and Iowa, and the Ninth Circuit Court of Appeals,[5] which have applied

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3. *Id.*

4. Justice Sullivan stated: In view of the "exulted constitutional status given 'political speech' in Indiana by *Price v. State*, (1993), Ind., 622 N.E.2d 954. . . . Terry might be ripe for reexamination." 636 N.E.2d at 1259. After *Terry*, this Court recognized the necessity for considering the "constitutional tension between the First Amendment and the Code of Professional Responsibility. . . ," and has chosen to consider the affected State interest measured against the limitation placed upon freedom of expression on a case by case basis. *In re Friedland*, 416 N.E.2d 433, 437 (Ind. 1981).

5. *See In re Green*, 11 P.3d 1078, 1084 (Colo. 2000) ("Indeed, Colo. RPC 8.2(a) incorporates the *New York Times* standard. . . ."); *In re Shearin*, 765 A.2d 930 (Del. 2000); *In re Ronwin*, 557 N.W.2d 515 (Iowa 1997); *In re Graham*, 453 N.W.2d 313, 321 (Minn. 1990) ("The language of Rule 8.2(a) impliedly incorporates the [*New York Times*] standard"); *Standing Committee on Discipline, U.S. District Court v. Yagman*, 55 F.3d 1430 (9th Cir. 1955); *United States Dist. Ct. v. Sandlin*, 12 F.3d 861 (9th Cir. 1993).

the First Amendment *New York Times* standard to attorney criticism of judges and courts, the correctness of which is beyond doubt under the Supreme Court precedent.[6]

The Per Curiam Opinion does not address the issues and authorities that Respondent urged,[7] or Justice Sullivan's

6. The Rules of Professional Conduct are subject to the strictures of the First Amendment. *See Florida Bar v. Went For It Inc.*, 515 U.S. 618 (1995); *Gentile v. Nevada Bar Association*, 501 U.S. 1030 (1996). *Garrison, supra*, makes it clear that attorney's criticism of the judiciary even though false, is protected by "the great principles of the Constitution which secure freedom of expression . . . preclude attaching adverse consequences to any except the knowing and reckless falsehoods. 379 U.S. at 73. The disallowance to a public official of a civil remedy against criticism even if false "apply with no less force merely because the remedy is criminal. The constitutional guarantees of freedom of expression compel application of the same standard to the criminal remedy. . . ." *Id. New York Times* was in fact largely based on the analogy to the Court's previous holdings "that concern for the dignity and reputation of the courts does not justify the punishment as criminal contempt criticism of the judge or his decision . . . even though the utterance contain 'half truths' and 'misinformation' . . . surely the same must be true of the other government officials, such as elected city commissioners." 376 U.S. at 721.

7. The Per Curiam Opinion states that Respondent "provides no authority specifically illustrating why or how his statements are protected by State or Federal constitutional provisions." (Opinion pp. 5-6). However, Respondent respectfully urges the Court to reexamine Respondent's Brief, pp. 10-14 and the applicable case law from all of the various jurisdictions which have determined that the *New York Times* standard is in fact applicable to an attorney's criticism of a judge or a court which is outside the bounds of direct contempt and further that the *New York Times* standard has been accepted and adopted in Rule 8.2(a).

suggestion of the need for reexamining this Court's precedent, or the dissents of Justices Sullivan and Boehm in this case.

This fundamental error, in failing to examine, much less adopt, the First Amendment *New York Times* standard, led the Per Curiam Opinion into further error. An integral component of the *New York Times* standard (not to mention this Court's disciplinary rule) is that the attacker of speech, here the Disciplinary Commission, carries the burden to prove both that the speech is not true and that the speaker had actual knowledge or reckless disregard of the falsity of the speech. *See Idaho State Bar v. Topp*, *supra*, ("[W]e conclude that ISB has established for the purposes of this case, that Topps' statements as to Judge Michaud's motives were false. The parties stipulated that [the judge] would testify that his decision in the judicial confirmation proceeding was not politically motivated. . . ." 925 P.2d at 1121). There is no such evidence in the case at bar. To the contrary, the Per Curiam Opinion placed the burden of proof on Respondent. (Opinion p. 6-7) ("[W]e find that Respondent offered no evidence to support his contentions that, for example, the Court of Appeals was determined to find for appellee, no matter what. Without evidence, such statements should not be made anywhere."). This is in direct contravention of the First Amendment *New York Times* standard.

Further, the Per Curiam Opinion contravenes the First Amendment by determining that even if the charges were true, Respondent must confine such charges to the Judicial Qualifications Commission. Not only is such holding contrary to fundamental First Amendment precepts, *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829

(1978) (First Amendment bars criminal punishment of persons for divulging truthful misconduct information regarding judges as neither the reputation of a judge nor judicial integrity are sufficient to justify punishment of speech), but it directly limits Respondent's ability to protect his client's interests.

Finally, the Per Curiam Opinion further errs under the First Amendment *New York Times* standard by ignoring that Footnote 2 was but an expression of an opinion not capable of being proven true or false and therefore protected by the First Amendment. Again, Respondent specifically advanced this question of law to the Court and again the Per Curiam Opinion failed to discuss or give any reason for rejecting such First Amendment principles or for failing to adopt the dissent of Justice Sullivan in *In re Atanga*, *supra*, in this regard.

Judicial reputation is insufficient reason "for repressing speech that would otherwise be free" while the "institutional reputation of the courts, is entitled to no greater weight on the constitutional scales than another institution." *Landmark Communications*, 435 U.S. at 844. Justice Black observed, much as did Justice Boehm here, that "the assumption that respect for the judiciary can be won by shielding judges from public criticism wrongly apprises the character of American public opinion . . . [E]nforced silence, however limited, solely in the name of preserving the dignity of the bench would probably engender resentment, suspicion and contempt, much more than it would enhance respect."

Bridges v. California, 314 U.S. at 270-271.[8] This prediction seems to have come true in the case at bar. *See* Ex. 1 -6, attached hereto.

Conclusion/Relief. The Per Curiam Opinion's refusal to apply the First Amendment *New York Times* standard, error in itself, led the Court into multiple fundamental errors which stripped Respondent of any First Amendment rights and improperly cast the burden of proof on Respondent in contravention of both First Amendment principles and the disciplinary rules of this Court. This Court should grant rehearing, withdraw the opinion, after which, as set forth below, Justice Rucker should recuse himself. The Court should then reconsider this case anew in light of the First Amendment *New York Times* standard with the burden of proof properly cast.

* * * *

8. Or as put by Justice Frankfurter in dissent — speech cannot be punished "to protect the court as a mystical entity or the judges as individuals as anointed priests set apart from the community and spared the criticism to which in a democracy other public servants are exposed."